

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Petition for Waiver of Cynosure)	
Corporation)	CG Docket No. 02-278
)	
)	CG Docket No. 05-338
)	

**REPLY OF CYNOSURE, INC. IN SUPPORT OF ITS
PETITION FOR RETROACTIVE WAIVER**

Cynosure, Inc. (“Cynosure”) respectfully submits the following reply to a comment filed in opposition to its Petition for Retroactive Waiver (the “Petition”) by ARcare, Inc. (“ARcare”).¹ Cynosure’s Petition requests a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Regulation” or “Opt-out Requirement”) with respect to facsimiles advertising sent with the recipients’ prior express invitation or permission before April 30, 2015.²

The Commission has already rejected each argument raised by ARcare in opposition to the instant Petition. First, the Commission and the Consumer and Governmental Affairs Bureau (the “Bureau”) have conclusively determined that the Commission has sufficient authority to grant the waiver.³ Second, the Bureau has explicitly refused to deny petitions on the basis that they were filed after April 30, 2015, granting numerous petitioners filed after that date and on

¹ Comments of ARcare, Inc., CG Dkt. Nos., 02-278, 05-338 (“ARcare’s Comments”).

² Petition for Retroactive Waiver by Cynosure, Inc., CG Dkt. Nos. 02-278, 05-338 (“Petition”).

³ *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd 13998 (Oct. 30, 2014)(“Oct. 30 Waiver Order”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 8598 (Aug. 28, 2015)(“Aug. 28 Waiver Order”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 14057 (Dec. 9, 2015)(“Dec. 9 Waiver Order”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Dkt. Nos. 05-338,, 02-278 (Nov. 2, 2016) (“Nov. 2 Waiver Order”).

three separate occasions.⁴ Similarly, a petition will not be denied solely on the basis that some non-compliant faxes were sent after the compliance deadline; instead, the Bureau has granted waivers to such petitioners and has re-affirmed that such waivers are limited to faxes sent prior to April 30, 2015.⁵ Third, the Bureau has determined that the inclusion of non-compliant opt-out language does *not* rebut the presumption of confusion.⁶ Fourth, the Commission and Bureau have consistently stated that evidence of actual consent is unnecessary for obtaining a waiver; instead, “petitioners qualify for limited retroactive waivers if they do not include the requisite opt-out notice.”⁷

In short, Cynosure’s Petition meets the two requirements for waiver articulated by the Commission and Bureau: it is similarly situated to the original waiver recipients and its requested waiver is supported by good cause.⁸ Initially, Cynosure is similarly situated original waiver recipients as it was affected by industry-wide confusion resulting from the Junk Fax Order, it seeks a waiver for faxes sent prior to April 30, 2015 and it has asserted that it has sent faxes, including to members of the class alleged by ARcare, with prior express consent.⁹ Moreover, its request furthers the public interest and the same good cause exists for granting its Petition.¹⁰ For these reasons, Cynosure respectfully requests that the Bureau grant its request for a retroactive waiver of Section 64.1200(a)(4)(iv) to the extent the Regulation may apply to any faxes

⁴ Aug. 28 Waiver Order at ¶ 20; Dec. 9 Waiver Order at ¶ 18; Nov. 2 Waiver Order at ¶ 18.

⁵ Nov. 2 Waiver Order at ¶ 20.

⁶ Aug. 28 Waiver Order at ¶ 18.

⁷ See e.g., Aug. 28 Waiver Order ¶ 17.

⁸ Oct. 30 Waiver Order at ¶¶ 22-27; Dec. 9 Waiver Order at ¶ 13.

⁹ Dec. 9 Waiver Order at ¶ 13, n.55, *compare* Petition at pps. 2, 7-8.

¹⁰ Oct. 30 Waiver Order at ¶¶ 22-27.

transmitted by Cynosure (or on its behalf) with the prior express permission of the recipients or their agents.

I. THE COMMISSION AND BUREAU HAVE AUTHORITY TO GRANT THE REQUESTED RETROACTIVE WAIVER.

The Commission and Bureau have consistently held that the Commission is authorized to waive the Regulation for the “good cause shown.”¹¹ Specifically, “good cause” exists because due to confusion created by the inconsistency between a footnote in the Junk Fax Order and the Opt-out requirement, combined with potentially insufficient notice, waiver of the Regulation for faxes sent before April 30, 2015 is in the public interest.¹² ARcare makes no new arguments to contradict this conclusion. Instead, it merely incorporates by reference arguments made by itself and other parties that the Commission and Bureau have already rejected expressly.¹³ These arguments should be rejected.

II. CYNOSURE IS SIMILARLY SITUATED TO THE ORIGINAL PETITIONERS AND THE SAME GOOD CAUSE JUSTIFIES ITS PETITION.

The Commission has already determined that parties “similarly situated” to Cynosure are entitled to waiver of the Regulation based on “good cause.”¹⁴ On these same grounds Cynosure’s Petition should also be granted.

First, Cynosure is similarly situated to petitioners to whom the Commission and Bureau have already granted waivers.¹⁵ Like the prior successful petitioners, Cynosure was adversely

¹¹ Oct. 30 Waiver Order at ¶ 21; Aug. 28 Waiver Order at ¶ 13; Dec. 9 Waiver Order at ¶ 12; Nov. 2 Waiver Order at ¶ 21.

¹² Oct. 30 Waiver Order at ¶¶ 24-27.

¹³ ARcare’s Comments at p. 4.

¹⁴ Oct. 30 Waiver Order at ¶¶ 22, 28, 30; Aug. 28 Waiver Order at ¶¶ 12-16; Dec. 9 Waiver Order at ¶¶ 12-15; Nov. 2 Waiver Order at ¶ 12.

¹⁵ Aug. 28 Waiver Order at ¶ 20; Dec. 9 Waiver Order at ¶ 13, n 55.

impacted by the “industry-wide confusion resulting from the Junk Fax Order footnote and the Rule.”¹⁶ Contrary to ARcare’s contention, the limited opt-out notices included on faxes sent by Cynosure are *not* an indication that Cynosure “clearly understood” the Regulation.¹⁷ As the Bureau as already explained, what ARcare fails “to acknowledge [is that]... a business that understood the rule would have presumably included all elements of the required notice, not just a few.”¹⁸

Moreover, like the prior successful petitioners, Cynosure has also asserted that it sent faxes with prior express consent prior to April 30, 2015 and seeks a waiver of the Regulation with regard to those faxes.¹⁹ Neither the Bureau nor the Commission requires evidence of consent as a condition to granting the requested waiver.²⁰ In fact, the Bureau has “decline[d] to conduct a factual analysis to determine whether the petitioners actually obtained consent...[and] reiterate[d] the Commission’s statement that the granting of a waiver does not confirm or deny that the petitioners had the prior express permission of the recipients to send the faxes.”²¹ The issue of consent “remains a question for triers of fact in the private litigation.”²²

Thus, like the prior waiver recipients—including those who filed well after April 30, 2015 –Cynosure ha[s] “adequately demonstrated that [it] [is] similarly situated.”²³

¹⁶ Dec. 9 Waiver Order at ¶ 13, n.55, *compare* Petition at p. 6.

¹⁷ Aug. 28 Waiver Order at ¶ 18.

¹⁸ *Id.*

¹⁹ Dec. 9 Waiver Order at ¶ 13, n. 55, *compare* Petition at p. 2.

²⁰ Aug. 28 Waiver Order at ¶ 17; Dec. 9 Waiver Order at ¶ 16; Nov. 2 Waiver Order at ¶ 16.

²¹ Aug. 28 Waiver Order at ¶ 18.

²² *Id.* Indeed, Cynosure has asserted that it obtained prior express consent from people included as members of an uncertified class who are not yet parties with claims before a court.

²³ Dec. 9 Waiver Order at ¶ 13.

Second, the same “good cause” recognized by the Commission as warranting deviation from the Regulation exists with regard to Cynosure. Initially, the special circumstances detailed in the Order counsel in favor of waiver in its case.²⁴ Specifically, “confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of explicit notice—left Cynosure with “no legal certainty that an opt-out notice is required for solicited faxes.”²⁵ Further, the public interest favors waiving the Regulation as to Cynosure. Fairness counsels in favor of granting Cynosure the same waiver as the other successful petitioners. Unlike those similarly situated parties who have already received waivers, without the waiver Cynosure could still face the potential for substantial liability or costs for alleged violations arising out of reasonable confusion and lack of legal certainty. Granting Cynosure’s Petition, and waiving the Regulation in its case, will ensure just and equal treatment.

III. CYNOSURE’S PETITION IS TIMELY.

The Bureau has been clear: it will not “reject petitions solely on the basis that they were filed after April 30, 2015.”²⁶ Although it initially encouraged petitioners to make every effort to file by April 30, 2015, that date is a deadline for *compliance* with the Regulation, it is not a formal *filing* deadline and has not been treated as such.²⁷

Thus, the Bureau has granted petitions filed after April 30, 2015. It explained that granting such waivers “for faxes sent prior to the April 30, 2015 deadline imposed by the 2014 *Anda Commission Order* for compliance...does not contradict the purpose or intent of the initial

²⁴ Petition at pps. 6-8.

²⁵ *Id.* at 6; Oct. 30 Waiver Order at ¶ 13.

²⁶ Dec. 9 Waiver Order at ¶ 18.

²⁷ Oct. 30 Waiver Order at ¶ 30; Dec. 9 Waiver Order at ¶ 18.

waiver order as the parties involved are similarly situated to the original waiver recipients.”²⁸ Here, Cynosure has “adequately demonstrated” that it is similarly situated to the original waiver recipients.²⁹ It is, therefore, “deserving of a limited retroactive waiver for fax ads sent with recipients’ prior express consent or permission sent prior to April 30, 2015.”³⁰

Contrary to ARcare’s assertion, the existence of good cause and demonstration that it is “similarly situated” is a “sufficient,” and the only necessary, basis for granting Cynosure the requested waiver. As explained above, the Bureau has explicitly stated that the time of filing a petition not a relevant factor for “similarly situated” parties seeking a waiver for faxes sent before April 30, 2015.³¹ For this reason, the Commission and Bureau have never required any party to justify its failure to file before April 30, 2015 or to demonstrate that it made “every effort” to file by this date.³² Indeed, the Bureau has never relied on such explanations, even where voluntarily provided, as a basis for granting a waiver.³³ Where such explanations were provided, the petitions were granted because the parties were similarly situated to the other waiver recipients.³⁴ The same is true for Cynosure.

Notwithstanding the Bureau’s express finding that the time of filing is *not* a basis for denying a request to waive the Regulation, ARcare has not demonstrated any delay on the part of Cynosure. As ARcare readily admits, Cynosure was not even confronted with the subject lawsuit until July 27, 2016—more than a year after the April 30, 2015 compliance date—and did not file

²⁸ *Id.*

²⁹ *Id.* at ¶ 13, n. 55.

³⁰ *Id.*

³¹ *Id.*

³² *See id.* at ¶ 18.

³³ *Id.*

³⁴ *Id.*

its Answer until September 30, 2016.³⁵ Cynosure moved for a waiver less than a month later.³⁶ This small amount of time to resolve pleadings, complete an internal investigation and conduct discovery prior to expending resources necessary to the instant petition is reasonable.³⁷

ARcare's suggestion that the Bureau should deny the instant petition in its entirety on grounds that one or more fax was sent after the April 30, 2015 demonstrates a misunderstanding of the Bureau's orders and Cynosure's Petition. The Bureau has already determined that it will grant the same retroactive waiver articulated in the Original Order to parties who may have sent faxes after the compliance date.³⁸ It explained that insofar as such a petitioner "has demonstrated it is similarly situated to the initial waiver recipients," its request will be "granted with respect to faxes sent with the recipients' prior express permission or consent on or before April 30, 2015. Any noncompliant faxes sent after that date are subject to Commission enforcement and TCPA liability."³⁹ For its part, Cynosure requested "the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in the October 30, 2014 Waiver Order"—a waiver that, on its face, is limited to faxes sent prior to April 30, 2015.

In short, Cynosure's Petition was timely filed and ARcare's arguments should be disregarded. Not only did the Commission never set a deadline, the Bureau has expressly "decline[d] to reject petitions solely on the basis that they were filed after April 30, 2015."⁴⁰

³⁵ ARcare's Comments at p. 3.

³⁶ *Id.*

³⁷ Indeed, the Commission has granted at least one petition filed after April 30, 2015 despite the fact that the petitioner had been involved in TCPA litigation long before that date. *See e.g.*, Petition of SourceMedia LLC for Retroactive Waiver, CG Docket Nos. 2-278, 05-338 at 3 (filed Sep. 21, 2015).

³⁸ Nov. 2, 2016 Order at ¶ 20.

³⁹ *Id.*

⁴⁰ Dec. 9 at ¶ 18.

Moreover, the Bureau has determined that waivers for faxes sent prior to April 30, 2015 will not be impacted by any non-compliant faxes sent after that date.

Thus, Cynosure meets the sole requirements for waiving the Regulation: it is similarly situated to the original parties and good cause exists for waiver of the Regulation for faxes sent prior to April 30, 2015. Therefore, its request for a retroactive waiver should be granted.

IV. CONCLUSION.

For all of these reasons, Petitioner, Cynosure, Inc., respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in the October 30, 2014 Waiver Order for any solicited faxes sent after the effective date of the Regulation through April 30, 2015. Alternatively, as set forth in its Petition, Cynosure, Inc. respectfully requests that the Commission issue a declaratory ruling, clarifying: (1) that Section 64.1200(a)(4)(iv) of the Commission's rules applies only to unsolicited fax advertisements; and/or (2) that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(4)(iv) of the Commission's rules.

Respectfully submitted,

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